

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD GENE CASTLE,

Defendant-Appellant.

UNPUBLISHED

July 30, 2013

No. 308899

Allegan Circuit Court

LC No. 11-017292-FH

Before: MURPHY, C.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct, MCL 750.520b, four counts of second-degree criminal sexual conduct, MCL 750.520c, and one count of interfering with the reporting of a crime, MCL 750.483a. For the reasons set forth below, we affirm.

The record reflects that defendant sexually assaulted his daughter over a period of years. According to the victim, defendant performed sexual acts on her or forced her to perform sexual acts approximately 200 times. She further testified that defendant threatened to kill her if she told anyone about his conduct. The victim ultimately disclosed the abuse to family members, who took her to Safe Harbor in Allegan County, where Detective Craig Gardiner performed a forensic interview. The victim's uncle, Harry Castle, Jr., spoke to defendant several times before the victim talked to Detective Gardiner, and defendant asked Harry to urge the victim not to disclose the abuse. Defendant also told Harry that he tried to commit suicide twice, a claim Harry later learned was untrue. Defendant was ultimately tried and convicted of the crimes set forth above.

Defendant claims that his attorney provided ineffective assistance at trial. As this Court explained in *People v Crews*, 299 Mich App 381, 400; 829 NW2d 898 (2013):

In order to prevail on a claim of ineffective assistance of counsel, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness and that the deficiency so prejudiced the defendant as to deprive him or her of a fair trial. *People v Pickens*, 446 Mich 298, 302–303; 521 NW2d 797 (1994). Prejudice occurs if there is a reasonable probability that, but for defense counsel's error, the result of the proceedings

would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

Defendant failed to raise his claims in the trial court by moving for a new trial or *Ginther*¹ hearing, and “our review is limited to mistakes apparent from the existing record.” *People v Powell*, 278 Mich App 318, 324; 750 NW2d 607 (2008).

Defendant asserts that his attorney should have pursued an alibi defense and should have supported that defense by calling certain witnesses. He further claims that counsel should have called witnesses who would have contradicted the victim’s version of events. Defendant acknowledges that “decisions regarding what evidence to present and which witnesses to call are presumed to be matters of trial strategy, and we will not second-guess strategic decisions with the benefit of hindsight.” *People v Dunigan*, 299 Mich App 579, 589-590; 831 NW2d 243 (2013). However, he claims that counsel’s failure to present certain witnesses and evidence deprived him of a substantial defense. *Dunigan*, 299 Mich App at 589.

Defendant’s claim regarding counsel’s performance is not apparent from the existing record. Further defendant has failed to identify which witnesses counsel should have called with regard to his alleged alibi defense and which witnesses would have rebutted the victim’s claims. In his brief on appeal, defendant does not explain his alibi defense or present facts to support a claim that he was elsewhere when the victim claims the abuse occurred. As this Court explained in *People v Wacławski*, 286 Mich App 634, 679; 780 NW2d 321 (2009):

We cannot analyze what defendant has not presented. “It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position. The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow.” *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Moreover, while defendant asserts that counsel failed to timely file a notice of his alibi defense, again, he does not explain how the defense would have made a difference in the outcome of his case. He also fails to explain how counsel could have plausibly presented an alibi defense when it is undisputed that defendant lived with the victim, he and the victim shared a bedroom, he took the victim on road trips in his semi truck, and the victim testified that the abuse happened on 200 occasions, in different places of residence and in defendant’s truck.

The record reflects that defense counsel explained to the court that his strategy was to present testimony that the sexual assaults could not have occurred because other people were always with defendant and the victim and they never saw any improper conduct by defendant.

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defense counsel acted on this strategy by calling defendant's fiancée who testified that she was with defendant and the victim at all times, so the abuse could not have occurred. Counsel also called defendant's brother, William Castle, who testified that defendant and the victim often visited and stayed at his home and that he never witnessed any misconduct by defendant. Further, defense counsel called defendant's father, with whom defendant and the victim lived when the victim reported the abuse. Counsel elicited testimony from defendant's father that he was often at home, defendant was sometimes away for periods of time when he worked as a truck driver, and that he did not witness any abuse by defendant. Defense counsel also took the position that defendant was a strict disciplinarian and that the victim did not like all of defendant's rules. Counsel elicited testimony to support this theory from all of the above witnesses.

"A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Defendant appears to take the position that other witnesses would have bolstered the defense or shown that the abuse could not have occurred, but defense counsel vigorously presented this defense at trial and the jury apparently chose not to believe it. In light of the minor victim's claims of frequent abuse over a period of years, with little detail about dates and times, it was entirely reasonable that defense counsel chose to present testimony that defendant and the victim were rarely, if ever, alone, rather than attempting to show, through an alibi defense, that defendant was elsewhere on each occasion of alleged abuse. Further, defendant fails to set forth what specific witnesses would say to support an alibi defense or to rebut the victim's testimony, and he has not provided affidavits to show what the proposed testimony of any witnesses would have been. *People v Davis*, 250 Mich App 357, 369; 649 NW2d 94 (2002). Accordingly, defendant has not shown that counsel's conduct deprived him of a substantial defense, and he has not overcome the strong presumption that counsel's conduct amounted to sound trial strategy. *Id.*

Defendant asserts that counsel was ineffective for failing to investigate "the clinical notes and file of [the victim's] therapist" He claims that the evidence would have shown that the victim was upset with defendant for failing to spend enough time with her and her brother and that this would have supported his position that the victim made the allegations against him for retaliatory reasons. "The failure to make an adequate investigation is ineffective assistance of counsel if it undermines confidence in the trial's outcome." *People v Grant*, 470 Mich 477, 493; 684 NW2d 686 (2004). This is not the case here. Defendant has not shown that defense counsel could have legally obtained the records. More importantly however, during his cross-examination of the victim, defense counsel elicited testimony that the victim had expressed frustration about defendant spending too much time with his fiancée and her family, rather than with her. Thus, defense counsel introduced the very evidence defendant claims counsel failed to discover before trial. Defendant is not entitled to relief on this basis.

With regard to defendant's claim that counsel prohibited him from testifying, nothing in the record supports this claim. Generally, "an accused's decision to testify or not to testify is a strategic decision best left to an accused and his counsel." *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). The record does not show that defendant expressed to counsel that he wanted to testify or that counsel prohibited him from doing so, and no evidence shows that defendant expressed to the court that he wanted to testify. Absent such evidence, we presume the decision not to testify was a matter of trial strategy between defendant and his counsel.

Accordingly, defendant has failed to show that counsel provided ineffective assistance in this regard.

Defendant further claims that counsel should have consulted with and called an expert to inform the jury about interview protocol in child sexual assault cases and how abused children behave. The record does not indicate that counsel failed to consult with an expert prior to trial. And, again, “[a]n attorney’s decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy.” *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). We will not second guess matters of trial strategy on appeal. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999). Defense counsel extensively cross-examined the prosecutor’s child abuse experts on interviewing techniques and victim behavior. Defendant fails to explain who defense counsel should have called and what information this would have added for the jury’s edification. Further, to the extent defendant suggests that an expert was needed because the case hinged on the victim’s testimony alone, his observation is incorrect. Not only did the trial court observe that the victim made consistent statements in writing and at trial, defendant’s brother Harry testified that defendant’s reaction to the victim’s disclosure was to threaten or attempt suicide while imploring Harry to make the victim change her story, with the promise he would go to counseling. Thus, defendant fails to show how an additional child abuse expert would have undermined the victim’s credibility or otherwise assist in his defense. Nothing in the record suggests that counsel’s decision not to call an expert constituted ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy

/s/ Henry William Saad

/s/ Deborah A. Servitto